Supreme Court, U.S.
FILED
JAN 26 1983
Alexander L. St.

No. 82-966

Supreme Court of the United States

October Term, 1982

HELEN WEST,
Petitioner,

vs.

ROADWAY EXPRESS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD A. CHENOWETH, *Counsel of Record*
JOHN M. GLENN
ROBERT M. GIPPIN
BUCKINGHAM, DOOLITTLE & BURROUGHS
P.O. Box 1500
I Cascade Plaza
Akron, Ohio 44309
(216) 376-5300
Attorneys for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Statement of the Case 1

Argument in Opposition to Allowance of Writ of Certiorari 4

I. The Decision Below Is in Full Conformity With All Requirements of Substantive and Procedural Due Process, Has a Fair and Substantial Basis Under Ohio Law and Does Not Conflict With Any Applicable Decisions of This Court 4

A. No deprivation of substantive due process occurred below 4

B. The reversal of the verdict below pursuant to the Constitution and Rules of Court of Ohio complied with all requirements of procedural due process 7

II. No Question of Federal Law Was Decided Below Which Has Not Been, But Should Be, Settled by This Court 8

A. This Court lacks jurisdiction to review any claim of deprivation of equal protection of the laws or of privileges and immunities of citizens of the United States, because those issues were not raised below 8

B. No deprivation of equal protection occurred below 9

C. Petitioner has suffered no abridgement of her privileges and immunities as a citizen of the United States 12

Conclusion 13

Appendix:

Argument From Helen West's Memorandum in Support of Claimed Jurisdiction in the Supreme Court of Ohio A1

TABLE OF AUTHORITIES

Cases

Andrews v. Louisville & Nashville Railroad Company, 406 U.S. 320 (1972) 6

Baltimore & Carolina Line v. Redmann, 295 U.S. 654 (1935) 8

Bascom v. Shillito, 37 Ohio St. 431 (1882) 11

Beck v. Washington, 369 U.S. 541 (1962) 8

Bell v. Maryland, 378 U.S. 226 (1964) 12

Bell v. Wolfish, 441 U.S. 520 (1979) 4

Bishop v. Wood, 426 U.S. 341 (1976) 6

Brown v. Board of Education, 347 U.S. 483 (1954) 9

Cleland v. National College of Business, 435 U.S. 213 (1978) 9

Douglas v. California, 372 U.S. 353 (1963) 10

Fuller v. Oregon, 417 U.S. 40 (1974) 8

Galloway v. United States, 319 U.S. 372 (1943) 8

Griswold v. Connecticut, 381 U.S. 479 (1965) 10

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 10

Henkel v. Educational Research Council, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976) 4, 5, 6, 10, 11

Howard v. Kentucky, 200 U.S. 164 (1906) 8

In Re Griffiths, 413 U.S. 717 (1973) 9

Johnson v. Robison, 415 U.S. 361 (1974) 10
Korematsu v. United States, 323 U.S. 214 (1944) 9
Madden v. Kentucky, 309 U.S. 83 (1940) 12
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 9, 10
Moncol v. Board of Education, 55 Ohio St. 2d 72, 378 N.E.2d 155 (1978) 7
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 10
New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937) 8-9
Ohio Bell Telephone Company v. Public Utilities Commission of Ohio, 301 U.S. 292 (1937) 11
Perry v. Sindermann, 408 U.S. 593 (1972) 6
Ross v. Moffitt, 417 U.S. 600 (1974) 11
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 10, 11
Shapiro v. Thompson, 394 U.S. 618 (1969) 10
Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) 12
United States v. Kras, 409 U.S. 434 (1973) 10
Youngberg v. Romeo, 50 U.S.L.W. 4681 (1982) 4

Constitutional Provisions, Statutes and Rules

U.S. Const., Amend. XIV 8, 11
Ohio Const., Art. IV, §3(B)(2) 7
Ohio Rev. Code §1335.05 11
28 U.S.C. §1257 9
Ohio R. App. P., Rule 12(B) 7

Texts

60 A.L.R.3d 226, 232 (1974) 5
9 WIGMORE, EVIDENCE §2571 (Chadbourne rev. 1981) 11

No. 82-966

Supreme Court of the United States

October Term, 1982

HELEN WEST,
Petitioner,

vs.

ROADWAY EXPRESS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The present petition arises solely as a result of Petitioner's failure to prove the existence of an employment contract of definite duration in the state court below. She was accordingly unable to establish a right to damages on account of her termination. The issues were purely ones of evidentiary burden and contract construction under Ohio law. Having failed in that forum, Petitioner seeks to have this Court erect a federal constitutional doctrine of tenure in employment relationships. Such a doctrine has no basis in the Constitution and would conflict most strongly with the prior decisions of this Court.

Petitioner's Statement of the Case more or less accurately sets forth the factual background of her action and the key aspects of the evidence presented below, but mischaracterizes the holding of the Ohio Court of Appeals and the basis upon which Petitioner first raised constitutional issues before the Supreme Court of Ohio.

Petitioner's central contention, that the Court of Appeals held that she could have no contract of employment, is a glaring mischaracterization of the record. The Court of Appeals did not hold that "Plaintiff had neither an express nor an implied contract of employment" (Petitioner's Brief at 5 and App. A25), nor did it deny her right to enter into such a contract.

While the quoted phrase indeed appears in the Decision below, Petitioner cites it out of context, from a portion of the Decision which is not the subject of the present petition. Examination of the portion of the Decision dealing with the issue of the contract itself (Petitioner's Brief at App. A11) shows that the Court of Appeals held only that Petitioner's evidence was insufficient as a matter of state law to establish the existence of an employment contract of definite duration:

> After an extensive examination of the testimony and exhibits produced by the plaintiff, we discover no basis for a finding that the various documents, booklets, benefits, and company practices are sufficient to create an implied contract for permanent employment, and/or an implied contract not to discharge except for just cause, in derogation of the established law of Ohio. . .
>
> We must conclude that plaintiff's employment was for an indefinite period and as such was terminable at the will of either plaintiff or Roadway.

The cited language at Petitioner's App. A25 does not state the holding of the Court of Appeals and is of no constitutional significance. Petitioner's entire premise is thus without foundation in the record.

Examination of Petitioner's Memorandum in Support of Claimed Jurisdiction to the Supreme Court of Ohio shows that she did not assert any claim of deprivation of equal protection of the law or of her privileges and immunities as a citizen of the United States, but only of denial of due process. While she assigned broadly as error action "contrary to . . . the 14th Amendment of the Constitution of the United States," (Petitioner's Brief at 6 and App. A39), her Memorandum stated only that, "the Court of Appeals unconstitutionally impaired the obligation of Mrs. West's contract with Roadway, deprived her of liberty and property without due process of law, and trial by jury." (App. p. A15). Petitioner thus raises her equal protection and privileges and immunities claims for the first time in this Court.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

I. THE DECISION BELOW IS IN FULL CONFORMITY WITH ALL REQUIREMENTS OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS, HAS A FAIR AND SUBSTANTIAL BASIS UNDER OHIO LAW AND DOES NOT CONFLICT WITH ANY APPLICABLE DECISIONS OF THIS COURT.

Petitioner's due process argument is cast in terms of substantive due process only. Nevertheless, she seems to allude to procedural due process because she complains of the reversal of the jury verdict on appeal. Against the possibility that both aspects of the Due Process Clause are thus intended to be raised, both claims will be treated; both are groundless.

A. No Deprivation of Substantive Due Process Occurred Below.

The record below demonstrates no arbitrary or capricious deprivation of any of Petitioner's fundamental rights, as would be required to demonstrate a violation of substantive due process. *Youngberg v. Romeo*, 50 U.S.L.W. 4681 (1982); *Bell v. Wolfish*, 441 U.S. 520 (1979).

The Court of Appeals did not hold that Petitioner possessed no *right* to enter into a contract of definite duration, but expressly followed *Henkel v. Educational Research Council*, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976), the central holding of which is:

> 'Generally speaking, a contract for permanent employment, for life employment or for other terms pur-

> porting permanent employment, where the employee furnishes no consideration additional to the services incident to the employment, amounts to an indefinite general hiring terminable at the will of either party, and a discharge without cause does not constitute a breach of such contract justifying recovery of damages. . . .'

Id. at 255, 344 N.E.2d at 121-22. *Henkel* in turn did no more than follow the accepted American rule with respect to such employment relationships, as set forth in the Annotation at 60 A.L.R.3d 226, 232 (1974):

> Ordinarily, an employment agreement which mentions no period of duration, and is in a true sense made indefinite thereby, will be construed as being terminable at will by either party, and the burden of proving the contrary must be assumed by the party asserting that the employment was for a definite period. In fact, it has been said that such an agreement is not a contract at all, even though it may be certain insofar as wages to be paid and services to be performed are concerned; rather, such an agreement is an expression in which the promises as to the performance of services and the payment of compensation are illusory, since refusal to perform is not a breach, but an exercise of a reserved power to terminate.

Ohio law, as expressed in *Henkel, supra,* and in the present action, does not bar the formation of a contract of definite duration, but only sets evidentiary standards as to the requirements for proving the existence of such a contract, which Petitioner failed to meet. Petitioner nowhere contended below that the *Henkel* rule is itself contrary to the federal Constitution, but only that the Ohio Court of Appeals did not follow *Henkel.* Plaintiff,

moreover, has not demonstrated that a contract of indefinite duration ought to be accorded the stature of tenured employment, as a matter of federal constitutional law.[1]

This Court has frequently upheld the American rule reflected in *Henkel v. Educational Council, supra*, that an employment relationship, without more, is terminable at will by either party. *Bishop v. Wood*, 426 U.S. 341 (1976); *Andrews v. Louisville & Nashville Railroad Company*, 406 U.S. 320 (1972). Petitioner has cited no cases upholding a federal right of tenured employment. Indeed, the "common-law" tenure described in *Perry v. Sindermann*, 408 U.S. 593, 602 (1972), cited by Petitioner, was expressly stated by the court to be an issue to be determined under Texas law:

> We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .' *Board of Regents v. Roth, supra*, at 577, 33 L. Ed. 2d at 561. If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.

Id. at 602 n.7.

---

1. As noted, Ohio has no such doctrine. The Ohio Common Pleas Court appeared incorrectly to have set out a theory of implied tenure in partially overruling Respondents' Motion for Summary Judgment below. See, Decision of the Court of Appeals, Petitioner's Brief at App. A6. The trial court's view was implicitly overruled by the Court of Appeals, following *Henkel, supra*. In any event, the trial court was presumably only expressing a view of Ohio, not federal, law.

B. The Reversal of the Verdict Below Pursuant to the Constitution and Rules of Court of Ohio Complied With All Requirements of Procedural Due Process.

The Court of Appeals exists by virtue of Article IV, Section 3 of the Constitution of Ohio, which provides in Division (B)(2) thereof,

> Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

Moreover, Rule 12(B) of the Ohio Rules of Appellate Procedure provides as follows:

> When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered.

It has been held by the Supreme Court of Ohio that it is the duty of a Court of Appeals to enter judgment for the appellant where the error assigned and sustained is the failure of the trial court to enter a directed verdict pursuant to motion. *Moncol v. Board of Education*, 55 Ohio St. 2d 72, 378 N.E.2d 155 (1978).

This Court has on several occasions determined that actions taken by a state or federal court pursuant to the laws and rules applicable to it, including the entering of judgment upon a directed verdict, do not constitute a deprivation of due process of law. *Galloway v. United States*, 319 U.S. 372 (1943); *Baltimore & Carolina Line v. Redmann*, 295 U.S. 654 (1935). Moreover, this Court will not review mere errors in the application of state law by a state court, such as Petitioner apparently contends occurred here. *Beck v. Washington*, 369 U.S. 541 (1962); *Howard v. Kentucky*, 200 U.S. 164 (1906). The reversal of the Ohio courts below on account of their alleged failure to apply Ohio law correctly would, in any event, be without significance beyond the limited controversy between these parties.

II. NO QUESTION OF FEDERAL LAW WAS DECIDED BELOW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. This Court Lacks Jurisdiction to Review Any Claim of Deprivation of Equal Protection of the Laws or of Privileges and Immunities of Citizens of the United States, Because Those Issues Were Not Raised Below.

As previously noted, Petitioner first raised her constitutional claims to the Supreme Court of Ohio, and did so only under the Due Process Clause of the 14th Amendment, and not under the Equal Protection or Privileges and Immunities Clauses. By reference in her Memorandum to the one clause and not to the others, the Supreme Court of Ohio could not have realized that an equal protection or privileges and immunities argument was being advanced, if in fact that was the case. Constitutional arguments of that nature cannot be raised for the first time before this Court. *Fuller v. Oregon*, 417 U.S. 40 (1974); *New York ex*

rel. Cohn v. Graves, 300 U.S. 308 (1937). There is thus a failure to meet the jurisdictional requirements of 28 U.S.C. §1257.

B. No Deprivation of Equal Protection Occurred Below.

Even assuming that Petitioner's equal protection argument is properly before this Court, the attributes of such a claim are simply not made out.

As an initial matter, Petitioner herein has failed to allege her categorization into a suspect classification which would necessitate strict scrutiny by the Court. *See, e.g., In Re Griffiths*, 413 U.S. 717 (1973) (alienage); *Brown v. Board of Education*, 347 U.S. 483 (1954) (race); *Korematsu v. United States*, 323 U.S. 214 (1944) (ancestry). She seeks to vindicate the rights of "middle-level management employees" (Petitioner's Brief at 11), or, more broadly, of "nonunion employees" (Petitioner's Brief at 9).[2]

Petitioner has cited no cases demonstrating that such a class of employees forms a suspect category within the meaning of the Equal Protection Clause and indeed there is no basis for such a categorization. *See, e.g., Cleland v. National College of Business*, 435 U.S. 213 (1978) (holding that classifications based on one's status as a veteran are not suspect); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (holding that classifications based

---

2. Petitioner's contention that "Ohio has created a new classification of employees, i.e., 'non-contract' employees, thus denying some employees the same right to enter into employment contracts as is granted to other employees," (Petitioner's Brief at 11) is circular. Petitioner's asserted class has no defined attributes other than the absence of the very contracts claimed to have been deprived them by the state. The suspect attributes must be the cause, not the effect, of unconstitutional state action.

on age are not suspect); *Johnson v. Robison*, 415 U.S. 361 (1974) (holding that classifications based on one's status as a conscientious objector are not suspect); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (holding that classifications based on wealth are not suspect).

Neither has Petitioner established that employment as such is a fundamental right, one which could only be limited to serve a compelling state interest. Where such rights have been recognized they have been expressly and narrowly defined. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (right to vote and participate in electoral process); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *Douglas v. California*, 372 U.S. 353 (1963) (right to counsel in first appeal); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (freedom of association).

Other claimed rights have been rigorously excluded. *See, e.g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (government employment); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (education); *United States v. Kras*, 409 U.S. 434 (1973) (bankruptcy).

The proper analysis to be applied to Petitioner's contention, therefore, is whether the rule of Ohio law expressed in *Henkel v. Educational Council, supra*, is arbitrary or unreasonable insofar as it causes her not to have tenured employment as she would under a contract of definite duration.[3] As demonstrated above, Petitioner has not been accorded disparate treatment under the law of Ohio as to

---

3. It should be emphasized again that Petitioner did not challenge the constitutionality of the *Henkel* rule below.

her right to contract for tenured employment, which has not been abridged.[4]

Petitioner appears to contend that employees of her status implicitly lack sufficient bargaining to obtain such contracts. However, the bare statement at page 9 of Petitioner's Brief that, "no employer, unless the employee has a remarkable talent or unique skill, will ever promise employment for a specific duration," lacks any foundation in the record below and is not susceptible to judicial notice. *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio,* 301 U.S. 292 (1937); 9 WIGMORE, EVIDENCE §2571 (Chadbourne rev. 1981).

This Court has never held that a state is obligated under the 14th Amendment to intervene in private relationships to ameliorate unequal bargaining power. *Ross v. Moffitt,* 417 U.S. 600 (1974); *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). The failure of the State of Ohio to imply tenure into employment relationships is neither arbitrary nor unreasonable.

---

4. The doctrine of *Henkel v. Educational Council, supra,* as followed in the present case, imposes no bar upon the right of employees to contract for definite duration, thereby granting themselves a form of tenure. *Henkel* merely holds that tenure will not be inferred from the existence of an employment relationship alone, without more. The Petitioner herself has noted, citing *Bascom v. Shillito,* 37 Ohio St. 431 (1882), that the issue of the existence of a contract of employment of definite duration is one of fact. Presumably, the evidentiary burden as to such a contract would be no different than for proof of the existence of any other contract. A contract for a definite term in excess of one year in Ohio must be in writing to avoid the bar of the Statute of Frauds, Section 1335.05, Ohio Revised Code.

C. Petitioner Has Suffered No Abridgement of Her Privileges and Immunities as a Citizen of the United States.

Petitioner's claims under the Privileges and Immunities Clause, like her previous claims, depend upon her erroneous characterization of the decisions below as having deprived her of the "right to make and enforce an employment contract." (Petitioner's Brief at 13). Petitioner never claimed more than an *implied* contract in any event. She was and is free to bargain for express tenured employment, as has been noted above.

In this final aspect of her argument, however, Petitioner seems to recognize that employment tenure is a matter of state law under present constitutional interpretation, but seeks by calling for reversal of the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36 (1873), to make it newly a matter of federal right.

Broadening the Privileges and Immunities Clause has been consistently refused by this Court. *Bell v. Maryland,* 378 U.S. 226 (1964); *Madden v. Kentucky,* 309 U.S. 83 (1940). Petitioner has demonstrated no basis for a review of the settled interpretation of the Clause. Tenured employment is not a fundamental right under the Constitution and the rights of citizens to be free of arbitrary and unreasonable applications of state law are amply protected elsewhere. Further scrutiny of the *Slaughter-House Cases* is unnecessary, as is the creation of any federal doctrine of tenured employment.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD A. CHENOWETH, *Counsel of Record*
JOHN M. GLENN
ROBERT M. GIPPIN
BUCKINGHAM, DOOLITTLE & BURROUGHS
P.O. Box 1500
I Cascade Plaza
Akron, Ohio 44309
(216) 376-5300
Attorneys for Respondent

APPENDIX

ARGUMENT FROM HELEN WEST'S MEMORANDUM IN SUPPORT OF CLAIMED JURISDICTION IN THE SUPREME COURT OF OHIO

ARGUMENT

Proposition of Law No. 1

The relationship of employer and employee arises out of contract, express or implied. As in the case of contracts generally, the duration of the contract, the time and method of termination, the compensation, and other provisions depend primarily upon the intention of the parties, interpreted in the light of all the surrounding facts and circumstances. (*Bascom v. Shillito* (1882), 37 Ohio St. 431 and *Kelly v. Carthage Wheel Co.* (1900), 62 Ohio St. 598 approved and followed.)

The Court of Appeals for Summit County misread *Henkel v. Educational Research Council* (1976), 45 Ohio St. 2d 249. The syllabus to *Henkel* holds:

> *In the absence of facts and circumstances* which indicate that the agreement is for a specific term, an employment contract which provides for an annual rate of compensation, but makes no provision as to the duration of the employment, is not a contract for one year, but is terminable at will by either party. (Emphasis added).

Mrs. Henkel claimed she had a one year contract of employment solely by reason of a promise to pay her an annual salary of $10,800.00. Judge Paul W. Brown, writing

the Court's opinion deciding against Mrs. Henkel, referred to the surrounding facts and circumstance of her employment and followed two earlier Ohio Supreme Court cases: *Bascom v. Shillito* (1882), 37 Ohio St. 431 and *Kelly v. Carthage Wheel Co.* (1900), 62 Ohio St. 598. Judge Brown commented at 251-252:

> Bascom involved application to an oral contract of the principle that employment contracts which are silent as to the term of employment are to be interpreted in light of all relevant circumstances, including "proof of the periods at which payments were to be made, the character of the employment, custom, the course of dealing between the parties, or other fact which may throw light upon the question." . . .
>
> ". . . [t]he issue presented was purely one of fact; that it was for the jury to say whether that which took place between the parties, as detailed by the evidence, constituted a hiring for a year; that it was a question of intention, to be determined with reference to all the circumstances and facts of the case; . . ."

Further supporting the Court's opinion that the interpretation of the employment contract depends upon the intent of the parties, Judge Brown, at page 253, quoted *Kelly v. Carthage Wheel Co., supra*:

> "And, in the interpretation of contracts of this kind, as well as of all others, none of their provisions should be ignored or overlooked, that serve to indicate the intention of the parties."

Judge Brown further commented, at page 254, that, to reach the correct conclusion in *Kelly*, the Ohio Supreme Court

considered all relevant facts and circumstances, and carefully scrutinized the terms to the written offer. We view that approach as sound.

Because, except by inference, Roadway's contract of employment was silent as to the term of employment, we, as did Judge Price, also viewed the period, or term, and other terms of the contract to be issues of fact to be determined by a jury, as was done in *Bascom* and *Kelly*. If this Court in *Henkel* meant to imply that the terms of employment contracts are not questions of fact, to be interpreted in light of all relevant circumstances, then we respectfully urge the Court to accept jurisdiction of this case to either reverse, explain or qualify *Bascom v. Shillito,* and *Kelly v. Carthage Wheel Co.*, so that other common pleas courts will not expend needless time and effort in pointless litigation. On the other hand, if the Court of Appeals misread *Henkel,* as we believe it did, then we respectfully request this Court to assume jurisdiction to clarify its decision in *Henkel* and adopt our suggested proposition of law as a syllabus for this case.

Proposition of Law No. 2

If an employer restricts its employees' freedom to terminate their employment so that their employment is not terminable at will, then the employer may not terminate its employees at will but only for just cause.

This proposition was argued by Mrs. West in opposition to Roadway's motions for summary judgment and for a directed verdict, and was argued to the jury. It was also argued in Mrs. West's brief, as appellee, in the Court of Appeals, and discussed in oral argument. These critical facts and their obvious implications were totally ignored by the Court of Appeals.

A. *Because Roadway's employees were not free to terminate their employment at will, "mutuality of obligation" requires that Roadway should not be free to terminate its employees at will.*

The reason for the common law *presumption* that an employment contract for an indefinite term was terminable at the will of the master and servant was because it lacked "mutuality".

> An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; . . . and the law will presume . . . that he did not so intend. And if the contract of employment be not binding on the employee for the whole term of such employment, then it cannot be binding upon the employer; there would be lack of "mutuality". (*Pitcher v. United Oil & Gas Syndicate, Inc.* (1932) 174 La. 66, 69, 139 So. 760, 761).

Because Helen West and other Roadway employees would have sustained a substantial financial loss if they quit Roadway before retirement or entered into competition with it, they were not free to terminate their employment at will.

Roadway structured its compensation to financially penalize those employees voluntarily terminating their employment or competing with Roadway before or after retirement. Mrs. West and other nonunion, salaried employees at Roadway forfeited a portion of their stock and, before ERISA, their pension[2] if they quit before retire-

---

2. Roadway's contributions to its stock bonus and pension plans are deductible by Roadway from its federal income tax in the year in which expended and are not taxable to Roadway's employees until the stock or pension is received.

ment or if they competed with Roadway before or after retirement.[3] Had she quit on June 24, 1976, as Mr. Spitznagel requested, rather than being fired, and could have found employment with another trucking company, she would have forfeited seventy-five percent of the stock credited to her account. Her total stock compensation from 1966 through 1976 had a cost basis of $11,219.00; stock costing $8,435.00 would have been forfeited. (Plaintiff's exhibit 60). (By 1976, the market value of the stock had increased almost four hundred percent over its cost.) Roadway tied its employees to it for the duration because, as Mr. Spitznagel testified:

> [W]e have a very great interest in keeping productive employees, or having a productive work force at all times (T.O.P. 211).

Roadway's stock bonus plan brochure (plaintiff's exhibit 46, pg. 6) itself announced its purpose:

> A principal objective of the Plan is to encourage long term employment with the company.

Any stock forfeited by employees who quit or competed vested in those loyal employees who remained with the company, another inducement to stay with Roadway until retirement. The amount of financial loss which would have been sustained by Roadway's employees quitting to work for a competitor would have been staggering. Under these circumstances, Mrs. West's and other Roadway employees' apparent freedom to leave their employ is a fiction.

---

3. Other highly competitive industries often utilize such forfeiture provisions. See *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 24 Cal.App. 3d 35, 100 Cal. Rptr. 791, *affd* (1973), 414 U.S. 117.

B. *By structuring its employees' compensation to create a burden of diminished employee mobility, Roadway required its employees to furnish a consideration and Roadway received a benefit in addition to its employees' services.*

Furthermore, it has always been the law that where an employee furnishes a consideration in addition to his services, the requirement of "mutuality of obligation" is satisfied, and the contract is not terminable at will. 35 O.Jur. 2d, *Master and Servant* §14. Roadway's stock bonus plan and, before ERISA, its pension plan are simply contracts in partial restraint of trade, which are enforcible if supported by consideration and not unreasonable and oppressive. 17 O.Jur. 3d, *Contracts* §124; *Raimonde v. Van Vlereh* (1975), 42 Ohio St. 2d 21. In *Maloney v. E.I. Du Pont de Nemours & Co.* (1965), 352 F.2d 936, 236, *cert. denied* 383 U.S. 948, the court held, at 352 F.2d 939, that restrictions on the right to compete with an employer create a "substantial burden of diminished employment mobility". *Cf., Buschmeyer v. Advance Machine Co.* (1916), 7 Ohio App. 202. In consideration of their employment, salaried, nonunion employees like Mrs. West were restricted in their freedom to quit and compete.

The fact that Roadway's plans are voluntary does not render the employees' consideration illusory. The admitted benefit of the plans to Roadway was to encourage lifetime employment. The plans accomplished that end. Moreover, it was another fact evidencing Roadway's intent to provide permanent employment. The net effect of the Court of Appeals' decision is that Roadway, under that court's view of the common law of Ohio, is free to terminate its employees at will, but Roadway's employees, under the same common law, are not free to terminate at

will. The reason makes the rule and where the reason does not apply, then the rule should not apply.

Proposition of Law No. 3

An employment contract provision that an employee shall not be discharged except for cause may become part of the contract either by express agreement, oral or written, or as a result of the employee's reasonable expectations grounded in the employer's employment practices and personnel policies.

In one swath, the Court of Appeals, by finding she had no contract, cut off Helen West from all rights arising through her employment. But where an employer by its personnel practices and employment policies creates reasonable job expectations leading its employees to believe they have a job until retirement age providing they do their jobs well, thus encouraging loyalty and long service, the employer has created a situation instinct with an obligation justifying a dismissal only for good cause. As Judge Cardozo said in *Wood v. Lucy, Lady Duff-Gordon* (1917), 222 N.Y. 88, 118 N.E. 214:

> A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed. . . . If that is so, there is a contract.

Roadway established the following employment policies and practices from which a promise to dismiss only for cause could be inferred:

1. a probationary period of employment for all new employees;

2. dismissal of permanent employees only after notice and a third-party hearing;

3. postponed a portion of its employees compensation until retirement;

4. financially penalized those employees quitting before retirement or competing with it;

5. dismissed for good cause only after documenting reasons in the personnel file;

6. assured employees of job security and otherwise represented that an employee had a job with Roadway for his working life if he did his work well and was loyal and faithful to the company.

Our suggested proposition of law is not unique or radical. It is grounded on the employer's own conduct and employment practices. Several states have held that an employer through company policies and practices may create a "situation instinct with an obligation" not to dismiss its employees except for good cause, even though there may be no express promise of employment for a definite term. Some representative decisions are: *Fortune v. National Cash Register Co.* (Mass. 1977), 364 N.E. 2d 1251; *Toussaint v. Blue Cross & Blue Shield of Michigan* (1980), 408 Mich. 579, 292 N.W. 2d 892; *Pugh v. See's Candies, Inc.* (1st Dist. 1981), 116 Cal. App. 3d 311, 171 Cal. Rptr. 917. This Court planted the seeds of this proposition of law in 1882 when it held in the last sentence of the syllabus to *Bascom v. Shillito*, 37 Ohio St. 431: "Express words that the employment should continue for a year are not essential."

Proposition of Law No. 4

An employee has a cause of action in tort when the employee is discharged for refusing to commit an illegal act, an act which violates a fundamental principle of public policy, or the employee's civil or federal constitutional rights. When the employee's loss of employment is on the basis of sex and violates the employee's civil rights, the employee has a private cause of action for rights established by R.C. 4112.02 and 42 U.S.C. §§2000 *et seq.*

Mrs. West alleged and offered evidence in opposition to Roadway's summary judgment motion that defendants' campaign of "sexual harassment and abusive, malicious, wrongful and wanton discharge" was tortious and violated her civil rights, interfered with her contract relations, invaded her privacy, and intentionally inflicted emotional and mental distress.

A wrongful discharge suit exhibits the classic elements of a tort cause of action. As Professor Prosser has explained:

> Tort actions are created to protect the interests in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . .
>
> [Whereas] contract actions are created to protect the interests in having promises performed. (*Law of Torts* 613 [4th Ed. 1971]).

The Court of Appeals cited many cases from other states which have held that an employee may, under some circumstances, have a cause of action in tort for wrongful discharge. Other Ohio plaintiffs in other cases of wrongful dismissal, who believe they should not be discharged

for refusing to commit an unlawful or immoral act, will undoubtedly allege the tort theory of recovery.

A campaign of sexual harassment, initiated by a male superior towards his female subordinate after she refused to submit to a sexual proposal, culminating in the employee's discharge is a form of employment discrimination based on sex and violates rights granted by Section 4112.02 of the Ohio Revised Code and 42 U.S. Code §§2000 *et seq.* The courts should be "sensitive to the need to protect the individual employee from discriminatory exclusion from the opportunity of employment . . ." *Tameny v. Atlantic Richfield Company* (1980), 610 P.2d 1330, 1336, 164 Cal. Rptr. 839. Judge Price dismissed these claims because Mrs. West had not exhausted her state or federal administrative remedies; however, these statutes establish the public policy of the United States and Ohio with respect to employment discrimination and should give rise to a private cause of action.

With respect to plaintiff's claim for interference with her contract relations, this case affords the Court an opportunity to explain its decisions in *Anderson v. Minter* (1972), 32 Ohio St. 2d 207 and *Fawcett v. G. C. Murphy & Co.* (1976), 46 Ohio St. 2d 245. Mrs. West's dismissal was for refusing to perform a act not "within the scope of a defendant's [Liipfert's] duties." *Fawcett v. G. C. Murphy & Co., supra,* 250.

Proposition of Law No. 5

When a court holds that an employer's promise of permanent employment until retirement age is for an indefinite duration and, hence, terminable at will as a matter of law, even though a jury has found that the parties intended the employment to be terminable only for cause, the state has thereby impaired the obligation of contract, deprived the employee of her liberty and property and denied her trial by jury, contrary to Article I, §§1 and 5 of the Constitution of Ohio and Article I, §10 and the Fourteenth Amendment of the Constitution of the United States.

The right of an employee to contract for his labor, *the right to work*, is a fundamental and vital constitutional right incorporating the rights to individual liberty and to acquire property. As Justice Pitney declared in *Coppage v. Kansas* (1915), 236 U.S. 1, 14:

> Included in the right of personal liberty and the right of private property . . . is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. . . . The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

Justice Stewart in *Perry v. Sindermann* (1972), 408 U.S. 593, 601, noted

> that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather "property" denotes a broad range

> of interests that are secured by "existing rules or understandings".

This Court has held that "[t]he master and servant relation is one of contract, express or implied." Paragraph 4 of the syllabus to *Floyd v. The DuBois Soap Co.* (1942), 139 Ohio St. 520.

Ohio, under both the federal and Ohio Constitutions, may not deprive an employee of the right to contract employment, including as it must the rights of personal liberty and of private property, without due process of law. If the Ohio General Assembly had enacted a statute providing that contracts of permanent employment were terminable at will as a matter of law, even though the parties had agreed that they were terminable only for cause, would this court have any hesitancy in striking down such a statute as violative of freedom of contract and due process?

The state action depriving Mrs. West of her liberty and her property by impairing her contract was by the Ninth District Court of Appeals, rather than the General Assembly. State action within the prohibition of the Fourteenth Amendment can be judicial action as well as legislative or executive. *Shelley v. Kraemer* (1948), 334 U.S. 1. In *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930), 281 U.S. 673, 680, Justice Brandeis stated:

> The federal guarantee of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative branch of government.

The Ninth District Court of Appeals unconstitutionally deprived Helen West of her personal liberty and her right of private property, and impaired the obligation of her contract, when it held that her employment relationship with

Roadway was for an indefinite duration, as a matter of law, and did not arise out of contract, express or implied.

Furthermore, by setting aside the verdict of the jury, which had found a promise of assured employment until retirement, terminable only for good cause, and entering final judgment for Roadway, the Court of Appeals denied Helen West her constitutional right to trial by jury.

In addition, procedural due process requires a hearing when interests encompassed by the Fourteenth Amendment's protection of liberty and property are deprived. *Board of Regents v. Roth* (1972), 408 U.S. 564, 570, note 7. By setting aside the jury's verdict, the Court of Appeals sanctioned Roadway's denial of procedural due process established by Roadway's own employment policies and practices.

WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC AND GREAT GENERAL INTEREST

Helen West and other middle-level managerial employees at Roadway were not offered express, written contracts of employment. Moreover, had they joined a labor union and entered into a collective bargaining agreement, they would have been excluded from participation in Roadway's stock bonus, incentive pay, pension, and other benefits designed for management employees. Their employment contracts were, therefore, necessarily implied from documents and company policies.

The Court of Appeals, misreading *Henkel v. Educational Research Council* (1976), 45 Ohio St. 2d 249, held that Roadway's implied in-fact promise of assured employment until retirement was for an indefinite duration and, consequently, Mrs. West's employment was terminable at

will. In fact, the court held, contrary to the established law of Ohio,[4] that she had no contract of employment at all. Still later, the court, in ruling on her claim of retaliatory discharge, held that in Ohio there is "no reason on our part to implement what may be considered as the public policy of this state by creating new theories of tort liability." (Decision and Journal Entry, p. 22).

Before the late eighteenth century, the law of master and servant was considered a branch of the law of domestic relations. Like that of parent and child, the relationship was not terminable at will and could not be changed by agreement. But by the time of Blackstone, writing in 1765, some masters and servants could contract with each other. I Cooley's Blackstone, *Commentaries on the Law of England* 268 (3d ed. rev., Callaghan and Company, 1884).

With the coming of the Industrial Revolution, to facilitate mobility and to liberate workmen from the rigid control of their masters, "[c]ontract became a device for entering *legally unsupervised relations*", Selznick, *Law, Society and Industrial Justice,* 123 (Russell Sage Foundation, 1969). The traditional presumption that a general hiring, i.e., one without a specific term, was for a year, was replaced by the converse presumption that "a general or indefinite hiring is *prima facie,* a hiring at will". Wood, *A Treatise on the Law of Master and Servant* §134, (1887). But this presumption was not intended to become a fixed and immutable rule of law, as was the case before Blackstone, so as to deprive the parties of their freedom of contract; it was simply a presumption, but not conclusive,

---

4. R.C. 4141.01(B)(1) defines employment as "(a) Service performed for wages under any contract of hire, written or oral, express or implied. . . .".

which would control the relationship in the absence of a contrary intent. Wood, §134, n.5.

After reviewing the evidence, instead of holding that the jury's verdict finding a promise by Roadway of assured employment until retirement terminable only for cause was against the manifest weight of the evidence, which would have required a remand and new trial under *Hanna v. Wagner* (1974) 39 Ohio St. 2d 64 and Appellate Rule 12(D), the court entered final judgment for Roadway. In so doing, the Court of Appeals unconstitutionally impaired the obligation of Mrs. West's contract with Roadway, deprived her of her liberty and property without due process of law, and trial by jury.

Unquestionably, an employer may dismiss an employee for good cause. But the result of the Court of Appeals's holding is that in Ohio an employer who has impliedly promised an employee permanent employment until retirement, subject to termination for good cause, may still dismiss the employee "for such cause as the employer believes valid" (Decision and Journal Entry, p. 6). A management employee may be discharged for testifying truthfully in court, for being unduly friendly with a superior's rival, for refusing to contribute to the United Fund, for refusing to date a superior, for refusing to spy on another employee, for refusing to illegally fix prices, because he informed authorities about illegal corporate activities, to avoid paying a commission, to make room for a younger employee, or for any other imaginable reason whatsoever.

There is a compelling need in Ohio to provide some job security to middle-level, managerial employees who devote their lives to the company in the expectation of continuous employment, providing they do their jobs loyally and industriously. The contract aspects of the

Court of Appeals's decision affects every management level employee in Ohio who is not high enough in the corporate hierarchy to command a written contract of employment and not low enough to belong to a labor union. The tort aspect of the decision affects every employee who does not have an express, written contract of employment or who is not a member of a labor union, about seventy percent of the work force.[5]

For these reasons, plaintiff-appellant respectfully requests that this case be accepted for resolution on their merits of these timely and important issues.

Respectfully submitted,

JOHN L. WOLFE
1900 First National Tower
Akron, Ohio 44308
(216) 384-1160
Attorney for Plaintiff-Appellant

---

5. *Statistical Abstract of the United States*, Ohio: 1978, Table 715, p. 429, Department of Commerce, Bureau of Census (1980).